Board of Alien Labor Certification Appeals
United States Department of Labor
Washington, D.C.

DATE: June 1, 1998
CASE NO: 97-INA-456

In the Matter of:

PRN SERVICES, CORP.
Employer

On Behalf of:

GILBERTO GARCIA
Alien

Appearance: Jean-Pierre Karnos
Santa Ana, CA
For the Employer and Alien

Before: Holmes, Vittone, and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. §656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. §1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by §212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the

place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. §656.27 (c).

Statement of the Case

On April 18, 1994, PRN Services, Corp. ("employer") filed an application for labor certification to enable Gilberto Garcia ("alien") to fill the position of Carpet and Floor Layer at an hourly wage of $12.50 (AF 36). The job duties for the position are described as follows:

> The occupant of this position will be required to install and lay carpets and rugs. This person must have the ability to use sketches of floor plans to measure and cut carpeting size. Must be skilled in sewing sections of carpeting together by hand in addition to cutting and trimming carpet to fit along wall edges, openings and projections using a carpet knife and straight edges (AF 36).

The requirements are two years of experience in the job offered.

On February 1, 1996, the CO issued a Notice of Findings proposing to deny the labor certification. The CO found two deficiencies in the application. First, the CO determined that the employer's wage offer of $12.50 per hour was below the prevailing wage of $15.71. The CO pointed out that under §656.20 (c) (2), an employer is required to offer a wage that equals or exceeds the prevailing wage determined under §656.40. Second, the CO found that employer was not in compliance with §656.20 (c) (8) which requires that a bona fide job opening must exist to which qualified U.S. workers may be referred. The CO also cited §656.3 which defines "employment" as permanent full-time work by an employee for an employer other than oneself and "job opportunity" as a job opening for employment at a place in the United States to which U.S. workers can be referred. The CO noted that the alien had been performing the job duties for the employer since September 1993 and that it therefore appeared unlikely that he would be displaced by a U.S. worker. The CO therefore requested that the employer submit documentation substantiating that it presently conducts a carpeting and flooring business.

In rebuttal, dated April 5, 1996, the employer stated that it conducted a wage survey to determine the prevailing wage for a carpet and floor layer in the Los Angeles area. In conducting the wage survey, the employer contacted 16 similarly situated employers in Southern California and found that $12.50 was the prevailing wage (AF 39). In response to the bona fide job offer

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[1] All further references to documents contained in the Appeal File will be noted as "A*f n*," where *n* represents the page number.

issue, the employer submitted tax records, two business checks, and a business contractor license number (AF 15-16).

The CO issued the Final Determination on May 17, 1996, denying the labor certification. The CO determined that the employer's wage survey of the 16 employers did not follow the guidelines established under §656.40 and therefore concluded that the prevailing wage finding was unsubstantiated. The CO also found the employer's evidence relating to a bona fide job offer to be unconvincing, finding that it did not establish that it conducted a carpeting and flooring business. The CO observed that the submitted tax forms were 1099s which are used for work performed by contractors or non-employees (AF 5).

On June 7, 1996, the employer requested administrative review of Denial of Labor Certification pursuant to §656.26 (b) (1) (AF 1).

Discussion

The issues presented by this case are whether the employer offered the prevailing wage under §656.20 (c)(2), and whether the employer's offered position is a bona fide job offer that constitutes full-time employment under §§ 656.20 (c) (8) and 656.3.

According to §656.20 (c) (2), a job offer filed on behalf of aliens must clearly show that the wage offered equals or exceeds the prevailing wage determined pursuant to §656.40. Under §656.40 (a) (2) (i), the prevailing wage for labor certification purposes shall be the average rate of wages for workers similarly employed in the area of intended employment. *See Seibel & Stern*, 90-INA-86, 116 (Apr. 26, 1990).

The Board has held that where an employer challenges a CO's prevailing wage determination with its own wage survey, that survey must be relevant and accurate. *F.L. Tarantino & Sons Quakertown Memorials*, 90-INA-231 (June 13, 1991); *Sumax Industries*, 90-INA-502 (Dec. 4, 1991). An employer will not successfully challenge the CO's prevailing wage determination by relying on an independent survey which provides "insufficient" information. *Zenith Manufacturing and Chemical Corp*., 90-INA-211 (May 31, 1991). Accordingly, an employer should provide sufficient background information about its survey to allow a test of the adequacy of the sample. *Id*. Thus, an alternative survey must be adequately documented. For example, a survey which relies on salaries paid by competitors, but does not provide documentation by the competitors, may not be persuasive. *Crest Aviation, Inc*., 88-INA-365 (June 23, 1989).

In this case, the employer challenged the CO's prevailing wage finding and conducted a wage survey of 16 Southern California businesses, finding that the prevailing wage for a carpet and floor layer was $12.50. In documenting the wage survey, the employer provided the names and addresses of the employers, along with the wages they paid their carpet layers. Under the Board's holding in *Zenith*, which provides that an employer must provide sufficient background

information about its survey to allow a test of the sample, we find that this is inadequate documentation. The employer did not provide relevant information such as the telephone numbers of the surveyed companies or the names of the employees which it spoke to in compiling the wage information (AF 39-40). *See Gencorp,* 87-INA-659 (Jan. 13, 1988) (*en banc*) (the CO is not required to accept written statements provided in lieu of documentation as credible or true, but must consider them and give them the weight they rationally deserve). In addition, the employer failed to specify a wage for one of the surveyed companies, Alden's Carpets and Draperies (AF 40). Accordingly, we find the employer's wage survey is unsubstantiated and unpersuasive. As a result, labor certification cannot be granted and further examination of the reasons cited by the CO is unnecessary.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party

petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.